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Shrestha Sujan v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-O5(SH)-164–03 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND HADHARIAH ISMAIL JJCA
21 SEPTEMBER 2020

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Criminal Procedure — Appeal — Appeal against sentence — Appellant charged under s 304(a) of the Penal Code for culpable homicide not amounting to murder — Appellant convicted and sentenced to 22 years imprisonment — Whether court should exercise its discretion under s 293 of the Criminal Procedure Code D *— Whether sentence ought to be reduced — Criminal Procedure Code s 293*

The appellant was originally charged in the High Court for causing the death of the deceased in the worker's hostel, an offence under s 302 of the Penal Code ('the PC'). At the close of the prosecution's case, the learned trial judge found E there was no prima facie case for the offence under s 302 of the PC and amended the charge to s 304(a) of the PC. The prosecution's case rested mainly on the testimony of two eyewitnesses, SP1 and SP2. According to both SP1 and SP2, there were fights between 30 to 40 Nepali at the hostel. The deceased and the appellant were drinking alcohol and the appellant had stabbed the F deceased's left stomach once. After stabbing the deceased, the appellant ran away and was later arrested not far from the worker's hostel. The cause of the deceased's death was confirmed as stab wound and *hepatic steatosis*. In his defence, the appellant alleged that on the day of the incident, Deepak had given G him a drink that tasted weird and he felt dizzy. The appellant then heard a loud noise and people fighting about their religion, custom and race. He saw the deceased was fighting and hitting each other. The deceased had provoked the appellant. He then went to the kitchen to get a knife with the intention to stop the deceased from fighting and making provocation. He only knew that he had H stabbed the deceased when told about it by SP2 when he was in the police lock-up. The appellant was found guilty by the High Court and was convicted and sentenced to 22 years imprisonment. The appellant appealed against the sentence. At the time of the commission of the offence, the appellant was 19 years old and on the date of sentencing, the appellant was 21 years old. The I appellant contended that the sentence imposed by the trial judge was excessive as the appellant was a youthful offender. It was submitted that the court should exercise its discretion under s 293 of the Criminal Procedure Code ('the CPC') which dealt with sentencing on youthful offender and giving a lesser imprisonment term.

Held, reducing the sentence of imprisonment of 22 years to six years:

(1) By virtue of the word 'may' in s 293(1) of the CPC, it was not mandatory for the trial judge to consider s 293 before passing the sentence. However, the trial judge could still consider s 293 of the CPC and decide whether that section was applicable or not. The failure of the trial judge to consider s 293 of the CPC to reduce the sentence notwithstanding the trend of sentencing based on the special facts of the case had caused injustice to the appellant. The appellant was a foreigner. He was not only a young offender but he was also a first offender. The incident happened as a result of a fight amongst the Nepali workers who were arguing about their own race and culture. The appellant and the deceased were drinking alcohol before the incident. The appellant was not a hardcore criminal that posed a danger or threat to the society. Putting the appellant behind bars for too long a time would only burden the government with costs to feed a foreign prisoner. The appellant could be deported back to Nepal early if the imprisonment term was shorter and this saved the government's money. Therefore, considering the nature of the offence, how it was committed and the circumstances, s 293 of the CPC ought to be applied. Six years imprisonment from date of arrest would be just and fair. Therefore, the sentence of 22 years imprisonment ought to be reduced to six years (see paras 18–20).

[Bahasa Malaysia summary

Perayu pada mulanya didakwa di Mahkamah Tinggi kerana menyebabkan kematian si mati di asrama pekerja, suatu kesalahan di bawah s 302 Kanun Keseksaan ('KK'). Pada akhir kes pendakwaan, hakim bicara yang bijaksana mendapati tidak ada kes prima facie atas kesalahan di bawah s 302 KK dan mengubah tuduhan menjadi s 304(a) KK. Kes pendakwaan bergantung kepada keterangan kedua-dua, SP1 dan SP2. Menurut SP1 dan SP2, terdapat pergaduhan antara 30 hingga 40 orang Nepal di asrama. Si mati dan perayu sedang minum alkohol dan perayu telah menikam perut kiri si mati sekali. Setelah menikam si mati, perayu melarikan diri dan kemudian ditangkap tidak jauh dari asrama pekerja. Punca kematian si mati disahkan sebagai luka tikaman dan *hepatic steatosis*. Dalam pembelaannya, perayu mendakwa bahawa pada hari kejadian, Deepak telah memberinya minuman yang terasa aneh dan dia merasa pening. Perayu kemudian mendengar suara kuat dan orang-orang bergaduh berkenaan agama, adat dan bangsa mereka. Dia melihat si mati bertengkar dan saling memukul. Si mati telah memberi provokasi kepada perayu. Dia kemudian pergi ke dapur untuk mendapatkan pisau dengan tujuan untuk menghentikan si mati daripada bertengkar dan membuat provokasi. Dia hanya mengetahui bahawa dia telah menikam si mati ketika diberitahu oleh SP2 ketika dia berada di lokap polis. Perayu didapati bersalah oleh Mahkamah Tinggi dan telah disabitkan dan dijatuhkan hukuman penjara 22 tahun. Perayu membuat rayuan terhadap hukuman tersebut. Pada masa

melakukan kesalahan itu, perayu berumur 19 tahun dan pada tarikh dijatuhkan hukuman, perayu berumur 21 tahun. Perayu berpendapat bahawa hukuman yang dijatuhkan oleh hakim bicara adalah berlebihan kerana perayu adalah pesalah muda. Dihujahkan bahawa mahkamah harus menggunakan budi bicaranya di bawah s 293 Kanun Tatacara Jenayah ('KTJ') yang menangani hukuman terhadap pesalah muda dan memberikan hukuman penjara yang lebih rendah.

Diputuskan, mengurangkan hukuman penjara dari 22 tahun kepada enam tahun:

(1) Berdasarkan perkataan 'boleh' dalam s 293(1) KTJ, tidak diwajibkan bagi hakim bicara untuk mempertimbangkan s 293 sebelum menjatuhkan hukuman. Walau bagaimanapun, hakim bicara masih boleh mempertimbangkan s 293 KTJ dan memutuskan sama ada seksyen tersebut terpakai atau tidak. Kegagalan hakim bicara untuk mempertimbangkan s 293 KTJ untuk mengurangkan hukuman walaupun trend hukuman berdasarkan fakta khas kes telah menyebabkan ketidakadilan terhadap perayu. Perayu adalah orang asing. Dia bukan sahaja pesalah muda tetapi dia juga pesalah pertama. Kejadian itu berlaku akibat pergaduhan di antara pekerja Nepal yang bergaduh mengenai bangsa dan budaya mereka sendiri. Perayu dan si mati sedang minum alkohol sebelum kejadian. Perayu bukanlah penjenayah tegar yang menimbulkan bahaya atau ancaman kepada masyarakat. Menempatkan perayu di dalam penjara terlalu lama hanya akan membebankan kerajaan dengan kos untuk memberi makan kepada tahanan asing. Perayu dapat dihantar pulang ke Nepal lebih awal jika hukuman penjara lebih pendek dan ini menjimatkan wang kerajaan. Oleh itu, dengan mempertimbangkan sifat kesalahan, bagaimana kesalahan itu dilakukan dan keadaannya, s 293 KTJ harus diguna pakai. Hukuman penjara enam tahun dari tarikh penangkapan adalah adil dan saksama. Oleh itu, hukuman penjara 22 tahun harus dikurangkan menjadi enam tahun (lihat perenggan 18–20).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 ML J 193, FC (refd)
PP v Ahmad Khairul Fa' ais bin Mat Dahlan & Ors [2006] 5 MLJ 190, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

Legislation referred to

Criminal Procedure Code s 293, 293(1)
Penal Code ss 302, 304(a)

Appeal from: Criminal Trial No 45B-01–01 of 2017 (High Court, Muar)

Kharen Jit Kaur (Law Chambers of Kharen Jit & Assoc) for the appellant.
Zaki Asyraf Zubir (Deputy Public Prosecutor, Attorney General Chambers) for the respondent.

Hadhariah Ismail JCA (delivering judgment of the court):

[1] The appellant was originally charged in the High Court of Muar, Johor Bahru for causing the death of Hom Bahadur Magar on 4 June 2016 between 11pm to 11.50pm in the worker's hostel of Poh Keong Factory, District of Muar, Johor Bahru, an offence under s 302 of the Penal Code.

[2] At the close of the prosecution's case, the learned trial judge found there was no prima facie case for the offence under s 302 of the Penal Code and amended the charge to s 304(a) of the same Code. The appellant was called to enter his defence.

[3] At the conclusion of the trial, the appellant was found guilty by the High Court. He was convicted and sentenced to 22 years imprisonment from the date of his arrest on 5 June 2016. The appellant appealed against his conviction and sentence.

[4] We first heard the appeal on 3 February 2020. It was adjourned to 10 August 2020 for further submission by parties. On 10 August 2020, the appellant withdrew his appeal on conviction and appealed against the sentence only.

[5] It is not disputed that at the time of the commission of the offence, the appellant was 19 years old and on the date of sentencing, the appellant was 21 years old. Learned counsel for the appellant contended that the sentence imposed by the trial judge is excessive as the appellant is a youthful offender. It is submitted that the court should exercise it's discretion under s 293 of the Criminal Procedure Code ('the CPC') which deals with sentencing on youthful offender and give a lesser imprisonment term.

BRIEF BACKGROUND FACTS

[6] Both the appellant and the deceased were Nepali. They knew each other and they stay together at the worker's hostel of Poh Keong lndustri Sdn Bhd's factory.

[7] The representative of the deceased's employer, named Tan Joo Meng ('SP4') testifies that there were 75 workers staying in the said hostel. These workers were from Bangladesh, Nepal, Myanmar, Vietnam and Indonesia.

[8] The prosecution's case rest mainly on the testimony of it's two eye witnesses, namely Dinesh Budha Magar ('SP1') and GC Laxumal ('SP2'). Both SP1 and SP2 testify as to what they saw happen prior and after the incident as follows:

(a) there were fights between 30–40 Nepali at the hostel;

(b) the deceased and the appellant were drinking alcohol;

(c) the appellant took a knife from a kitchen which was situated beside the workers' hostel;

(d) the appellant came back inside the hostel and stab the deceased's left stomach only once;

(e) the deceased took out the knife from his stomach before he fell down;

(f) after stabbing the deceased, the appellant ran away;

(g) SP2 went to Bakri Police Station to report on the incident; and

(h) the appellant was arrested at a durian orchard, not far from the workers' hostel.

[9] The cause of the deceased's death was confirmed by SP11 as stab wound and *hepatic steatosis* (liver disease).

[10] In his defence, the appellant alleged as follows:

(a) on the day of the incident, he entered Deepak's room and was given a drink which looked like a Coca-Cola, but tasted weird and he felt dizzy. Deepak was not called as a witness because he could not be found;

(b) outside Deepak's room, he heard a loud noise and people fighting. The fight is about their religion, custom and race;

(c) he saw the deceased was fighting and hitting each other;

(d) the deceased had provoked him by uttering the following words:

> Anjing sini pergaduhan berlaku kau ingat kami sedang main-main. Saya anak bangsa Maghar, apa yang kau boleh buat?

(e) he then went to the kitchen to get a knife with the intention to stop the deceased from fighting and making provocation; and

(f) he only knew that he had stabbed the deceased when told about it by SP2 when he was in the police lock up.

THE ISSUE

[11] Whether this court should exercise its discretion under s 293 of the Criminal Procedure Code? Section 293 of the CPC provides as follows:

(1) When any youthful offender is convicted before any Criminal Court of any offence punishable by fine or imprisonment, the Court may, instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment:

(a) order the offender to be discharged after due admonition if the Court shall think fit;

(b) order the offender to be delivered to his parent or to his guardian or nearest adult relative or to such other person as the Court shall designate on such parent, guardian, relative or other person executing a bond with or without surety or sureties, as the Court may require, that he will be responsible for the good behaviour of the offender for any period not exceeding twelve months or without requiring any person to enter into any bond make an order in respect of the offender ordering him to be of good behaviour for any period not exceeding two years and containing any directions to that offender in the nature of the conditions referred to in paragraphs 294A(a), (b) and (c) which the Court shall think fit to give;

(c) order the offender, if a male, to be whipped with not more than ten strokes of a light cane or rattan within the Court premises and in the presence, if he desires to be present, of the parent or guardian of that offender;

(d) deal with the offender in the manner provided by the Child Act 2001 [Act 611]; or

(e) (i) to make an order requiring the offender to perform community service, not exceeding 240 hours in aggregate, of such nature and at such time and place and subject to such conditions as may be specified by the Court;
(ii) in this paragraph, 'community service' means any work, service or course of instruction for the betterment of the public at large and includes, any work performed which involves payment to the prison or local authority; and
(iii) the community service under this paragraph shall be under the Minister charged with the responsibility for women, family and community.

(2) (Deleted by Act A1274);

(3) When any order has been made under paragraph (1)(b) and the Court has reason to believe that the behaviour of the offender during the period specified in the order is not good or that the offender has not complied with any direction included in the order, the Court may issue a notice addressed to the offender and to the parent, guardian, relative or other person to whom the offender has been delivered or under whose supervision the offender has been ordered to remain to show cause why that offender should not be dealt with under paragraph (1)(d) and if cause is not shown to the satisfaction of the Court, the Court may cancel the order

made under the said paragraph (1)(b) and substitute for it as from tile date of the cancellation an order under the Child Act 2001, and may if necessary issue a warrant for the apprehension of that offender so that effect may be given to the order.

SUBMISSION OF PARTIES

[12] The learned DPP submits that by the usage of the words 'the Court may' appearing in sub-s (1) of s 293 of the CPC, it is not a mandatory requirement for the court to invoke s 293 when the accused person is of youthful age. In this appeal, it is submitted that although the appellant was a youthful offender, at the time of the sentencing, the learned trial judge was correct in sentencing the appellant with 22 years imprisonment. The appellant was convicted for an offence under s 304(a) of the Penal Code, a serious offence which carries a punishment of imprisonment for a term which may extend to 30 years. The learned DPP had produced a table to show the trend of sentencing for an offence under s 304(a) is between 18 years to 22 years imprisonment depending on the facts of each case. It is submitted that to sentence the appellant under any of the limbs under s 293 of the CPC will be manifestly inadequate. It is further submitted that the omission of the trial judge to mention s 293 of the CPC in her written judgment does not amount to a misdirecton. This is because the trial judge had considered all the important factors that needs to be taken into account before proceeding with the sentencing. Finally, it was submitted that if this court so desire, this court can reduced the imprisonment term from 22 years to 10–12 years.

[13] Learned counsel for the appellant submitted that the trial judge had erred in failing to consider s 293 of the CPC. Counsel urged this court to apply s 293 of the CPC and reduced the sentence to 6–7 years imprisonment based on the following mitigating factors:

(a) the appellant came to Malaysia in October 2015;

(b) he was 19 years old at the time of the commission of the offence;

(c) this is his first offence;

(d) he has no intention or premeditated plan to kill the deceased; and

(e) he stab the deceased once only.

[14] In passing the sentence, the learned trial judge said:

> Mahkamah berpendapat hukuman tersebut (22 tahun penjara) adalah setimpal dan munasabah berdasarkan alasan berikut:
>
> i) Hukuman yang diperuntukkan di bawah seksyen 304(a) Kanun Keseksaan ini boleh sehingga 30 tahun. Ini merupakan kesalahan yang serius yang telah menyebabkan kematian seseorang.

ii) Perbicaraan telah dijalankan setelah tertuduh pohon dibicarakan setelah pertuduhan pindaan dibuat dan dibacakan. Ini telah mengambil masa Mahkamah dan melibatkan kos.

iii) Hukuman ini berbentuk 'deterrent' kerana telah banyak jenayah di negara ini dilakukan oleh pekerja asing. Sepatutnya perkara ini dielakkan kerana seperti yang dinyatakan di dalam rayuannya, tertuduh mengatakan yang dia datang ke Malaysia untuk mencari rezeki. Tambahan pula dia telah beristeri dan merupakan anak lelaki tunggal kepada keluarga.

iv) Mahkamah juga telah melihat 'trend of sentencing' untuk kes-kes di bawah seksyen 304(a) ini yang kebanyakkannya tertuduh telah dikenakan hukuman dari 20 tahun ke 24 tahun.

[15] We are aware of the legal principles that the appellate court should not disturb the sentencing passed by the lower court unless the sentence is manifestly inadequate or excessive or there is error in the assessment of sentence. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 ML J 193, the Federal Court said:

> It is of the upmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence, see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256.

[16] In *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256, Hashim Yeop Sani J (as he then was) held:

> One of the main consideration in the assessment of sentence is of course the question of public interest.

[17] Similarly, in *Public Prosecutor v Ahmad Khairul Fa' ais bin Mat Dahlan & Ors* [2006] 5 MLJ 190, Singham J said:

> The court, in sentencing any prisoner, has an obligation to have regard to the public's expectation of what an appropriate punitive period of imprisonment should be having regard to all the relevant circumstances.

[18] We agree with the DPP that the trial judge had considered relevant factors including the seriousness of the offence and the trend of sentencing. We also agree with the DPP that by virtue of the word 'may' in s 293(1), it is not mandatory for the trial judge to consider s 293 before she passed the sentence. However, we took the view that the trial judge can still consider s 293 and decide whether that section is applicable or not. If the trial judge says s 293 is not applicable, she must state the reasons why it is not applicable. We find the

failure of the trial judge to consider s 293 to reduce the sentence notwithstanding the trend of sentencing based on the special facts of the case has caused injustice to the appellant.

[19] The special facts of this case meant by us are as follows:

(a) the appellant was a foreigner;

(b) he was not only a young offender but he was also a first offender;

(c) the incident happen as a result of a fight amongst the Nepali workers;

(d) the Nepali were arguing about their own race and culture;

(e) the appellant and the deceased's were drinking alcohol before the incident;

(f) the appellant is not a hardcore criminal that posed a danger or threat to our society;

(g) putting the appellant behind bar for too long a time only burdened our government with cost to feed foreign prisoner; and

(h) the appellant can be deported back to Nepal early if the imprisonment term is shorter and this save the government's money.

[20] Therefore, considering the nature of the offence, how it was committed and the circumstances mentioned above, we were of the opinion that s 293 of the CPC ought to be applied. We take the view that six years imprisonment from date of arrest will be just and fair. Therefore, we make an order that the sentence of 22 years imprisonment be reduced to six years. We also wish to state that this is not an authority for other cases where it does not involved youthful offender.

Sentence of imprisonment of 22 years reduced to six years.

Reported by Nabilah Syahida Abdullah Salleh